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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

EMMA TOVAR,

Petitioner,

vs.

IBP, INC.,

Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

# PETITION FOR WRIT OF CERTIORARI

David O. Alegria
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58 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether Kansas courts, in requiring plaintiffs opposing a motion for summary judgment in a retaliatory discharge case to demonstrate the existence of such retaliatory discharge by presenting clear and convincing evidence sufficient to support a jury verdict in plaintiff's favor, usurps the plaintiff's right to trial by jury, nullifies the cause of action and violates plaintiff's 7th amendment right of trial by jury.

2. Whether it is possible for a plaintiff to fully try a retaliatory discharge case through paperwork in responding to a summary judgment motion

3. Whether in Kansas, plaintiffs opposing a motion for summary judgment have the burden of proving such case by clear and convincing evidence to the court prior to being afforded a right to trial by jury.

## LIST OF ALL PARTIES

Petitioner, Emma Tovar.

Respondent/Appellee, IBP, inc.

There are no parent of subsidiary companies to be listed.

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## BASIS FOR JURISDICTION

DATE OF JUDGMENT

May 29, 1996

DATE OF ORDER ON REHEARING

July 8, 1996

STATUTORY PROVISIONS FOR JURISDICTION

28 U.S.C. § 2101(c)

NOTIFICATION

N/A

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Petitioner's cause of action is based on common law.

## STATEMENT OF THE CASE

This is a retaliatory/constructive discharge case, a tort action. The petitioner, Emma Tovar, was fired from her employment with respondent, IBP, inc., in retaliation for her pursuit of workers' compensation remedies under the Kansas Workers Compensation Act, and for absences related to her work-related injury.

In a Memorandum and Order entered on July 1, 1994, District Kathryn H. Vratil granted Respondent summary judgment. Judge Vratil found that respondent was entitled to summary judgment on the grounds that the petitioner failed to provide clear and convincing evidence of a causal connection between her workers' compensation claim filed on August 15, 1989, and her firing on August 19, 1991.

In this appeal, petitioner submits that this case presents genuine issues of material fact which were ignored by the district court. Specifically, Petitioner presented evidence to support her position that after her injury on August 15, 1989, respondent blamed Petitioner for her work related injury and created a hostile work environment for her. When her doctor took her off work for six months, respondent inappropriately pressured her doctor to return her to work earlier. The district court failed to acknowledge petitioner's

evidence of goals and incentive programs which provided the motivation for respondent's retaliatory actions. Evidence of company procedures were ignored by the district court, where respondent tells its management to find ways to fire injured workers. This appeal seeks an order vacating the summary judgment entered in favor of respondent, so that this case can proceed to trial for decision on the merits.

Most importantly, the issues decided by the court were controverted issues of material fact, which invaded the province of the trier of fact and violated the petitioner's right to trial by jury.

Jurisdiction of this action was conferred upon the district court on the basis of diversity of citizenship, 28 U.S.C. § 1332. Ms. Tovar, the petitioner, is an individual, resident of the state of Kansas. Respondent is a Nebraska corporation with its primary place of

business in Nebraska.

**ARGUMENT**

This case illustrates a current trend in Kansas wherein courts have taken over the role of a jury and are requiring plaintiffs in retaliatory discharge cases to prove such cases by a clear and convincing standard of proof to the court as a condition precedent to being entitled to a trial by jury. Petitioner contends and thereupon alleges that the right to trial by jury is a constitutionally guaranteed right that is being usurped under the current approach by Kansas courts.

Although, the summary judgment vehicle has been deemed to be constitutional and an expedient way to dispose of disputes, when such procedure is employed by the court to make judgment calls that are within the province of the jury, and the court requires a plaintiff to prove his/her case to the court in order to grant a trial by jury, the procedure becomes

unconstitutional.

Under traditional summary judgment standards, a plaintiff was only required to show that a genuine dispute existed and controverted issues of material fact are at stake. In analyzing such motion the court was only required to determine whether the possibility existed that a reasonable jury could find for the non-moving party. Under such traditional standards for summary judgment, the moving party was required to demonstrate the absence of a triable issue in order to be entitled to summary judgment. If the movant was able to make a sufficient showing that there was an absence of a triable issue, the non-movant was only required to dispute the alleged lack of controversy and come forth with evidence in the record of controverted issues of material fact.

A successful summary judgment motion was an extremely heavy burden imposed upon the moving party and was a vehicle seldom used. Over time,

courts have been increasingly more willing to summarily dispose of cases. Over time, courts have taken over the role of analyzing evidence, assessing the quality of the evidence, assessing the quantity of the evidence, weighing the evidence, and making conclusions as to credibility and intent.

Currently, in retaliatory discharge cases, it has become the practice in Kansas that once a defendant moves for summary judgment, the procedure set in motion requires a plaintiff to, through paperwork, present clear and convincing evidence of entitlement to a favorable jury verdict, before being entitled to proceed to trial.

Procedurally, a defendant circumscribes the parameters of its motion and the evidence to be presented to the court.

A causal connection between the firing of an employee and the exercise of statutory rights by such employee more often than not, can only

be shown through various pieces of circumstantial evidence that tend to make the existence of a fact, more probably true than not. Most importantly, such causal connection is shown through the perception by the trier of fact of the demeanor of the witnesses and the assessment by the trier of facts of a defendant's intent in firing a plaintiff. Because of the manner in which the causal connection must be presented, most often than not, it is impossible for a plaintiff to persuade a court by clear and convincing evidence of the existence of such causal connection in a motion for summary judgment.

In disposing of plaintiff's case at summary judgment stage in *Rodriguez v. IBP, inc.*, U.S. District Court Case No. 94-1168-PFK, the district court ruled that Kansas courts have uniformly held that:

> a party opposing a motion for summary judgment must demonstrate the existence

> of the retaliatory discharge by presenting evidence of a clear and convincing nature sufficient to support a jury verdict in his favor. at p. 11.

Such requirement expressly requires a plaintiff to win his case through paperwork prior to being entitled to trial by jury. The requirement clearly violates a plaintiff's constitutional right to trial by jury.

The defense bar in Kansas has persuaded the judiciary to analyze summary judgment motions employing a clear and convincing standard of proof to weigh the evidence in retaliatory discharge cases and make credibility and motive determinations at such stage

The unique combination of a new a more stringent application of summary judgment standards coupled with a requirement that a plaintiff must present clear and convincing evidence through paper work in essence eliminates a remedy for wrongful discharge in

violation of the public policy of the State of Kansas.

The role of courts in ruling on summary judgment motions in Kansas have gone too far and immediate corrective action is needed. This is petitioner's last chance at justice for herself and for all others whose cases will be disposed at summary judgment stage unless corrective action is taken by this court.

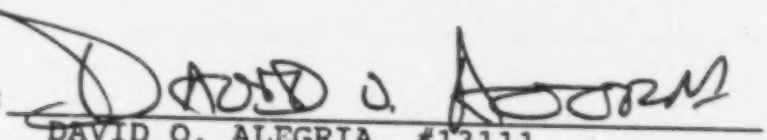
In this case, Ms. Tovar was to be off work by order of her doctor until October 21, 1991 until Respondent was able to inappropriately pressure her doctor into changing his orders. When Ms. Tovar returned to work, still in pain, two months earlier than her doctor had originally ordered, respondent fired her because she didn't return one week earlier. Clearly the motivation for respondent's insistence at her early return was simply to create a situation in which she could be fired. Therefore, she was fired solely and as a direct result of her

exercise of statutory rights under the Kansas Workers' Compensation Act. In spite of the fact that Ms Tovar in good faith, returned to work early at the insistence of respondent, she was fired. Ms. Tovar's case has been summarily disposed merely because respondent argued that she should have returned a week earlier and the district court failed to consider all of petitioner's evidence of respondent's motive and retaliation. There is substantial evidence that Ms. Tovar was harassed and mistreated, all because of her work related injuries. Therefore, had it not been for the Court's improper approach to summary judgment standards, Ms. Tovar's case should have been tried to a jury.

For the foregoing reasons, petitioner respectfully prays that her petition for a Writ of Certiorari be granted and that the court restore to Kansas employees fired in violation of public policy, a right to trial by jury.

Respectfully submitted,

McCULLOUGH, WAREHEIM & LaBUNKER, P.A.

By: 

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**APPENDIX**

Memorandum and Order, U.S. District Court for the District of Kansas, filed July 1, 1994

Order and Judgment, U. S. Court of Appeals, Tenth Circuit, filed May 29, 1996

Order, U. S. Court of Appeals, Tenth Circuit, entered July 8, 1996

IN THE UNITED SATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| ARNOLDO ORTEGA, AND EMMA TOVAR<br><br>Plaintiffs,<br><br>v.<br><br>IBP, inc.,<br><br>Defendant. | ) | CIVIL ACTION<br><br>No. 92-2351-KHV |

**MEMORANDUM AND ORDER**

This matter comes before the Court on Defendant IBP inc.'s Motion for Summary Judgment (Doc. #94) against plaintiff Emma Tovar. Tovar claims that defendant IBP, inc., terminated her employment in retaliation for the exercise of rights under the Kansas Workers' Compensation Act. Defendant seeks summary judgment, arguing that on the undisputed facts IBP terminated Tovar's employments for neutral, non-retaliatory reasons.

Summary judgment is appropriate if "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(d); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). When deciding a summary judgment motion, the Court considers all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). In this diversity case, we ascertain and apply Kansas law such that we reach the same result that a Kansas court would reach. See Adams-Arapahoe School Dist. No. 28-J v. GAF Corp., 959 F.2d 868, 870 (10th Cir. 1992).

A. Factual Claims

The following facts are construed in the light most favorable to plaintiff.

Beginning on May 15, 1975, IBP, inc., hired Emma Tovar at its beef processing plant in Emporia, Kansas. While working as a trimmer, Tovar sustained a work-related injury to her low back on April 14, 1989. After the injury, from April 17 to June 27, 1989, Tovar worked in the laundry folding gloves, a light/restricted duty position. From June 28, 1989, to July 12, 1989, Tovar was off work pursuant to doctor's instructions. She then returned to the glove-folding position. On September 7, 1989, IBP assigned Tovar to the job of picker, another light/restricted duty position. The record is vague concerning Tovar's work attendance between September 7, 1989, and September 28, 1990. Nevertheless, on the sketchy record, it appears to have been erratic.

Four months after the injury, on August 15 1989, Tovar filed a claim for

workers' compensation benefits.

Tovar claims that after the injury Greg Stromgren (IBP chief of security), Nancy Downs (IBP workers' compensation coordinator), and the IBP nurse often shouted and got upset with her, and put pressure on her to do work that she was unable to do.

During 1990, Tovar was treated by Dr. David Tillema, an orthopedic surgeon. On January 23, 1990, Dr. Tillema stated that tovar should return to work with restrictions including no bending or stooping, no lifting over 15 pounds, and no pushing or pulling. He believed she could return to a light-duty job involving sitting and "Bench-type" work.

On February 14, 1990, Tovar applied for vocational rehabilitation assessment and temporary total disability payments pursuant to K.S.A. §44-510g. On April 10, 1990, an administrative law judge granted

that application and, as a result, on April 17, 1990, IBP referred Tovar to Kansas Rehabilitation and Clinical Consultants (KRCC). Crystal Ebberts, a KRCC vocational rehabilitation counselor, took Tovar's case.

On May 29, 1990, Ebberts completed Tovar's vocational assessment and evaluation, noting that Tovar was restricted to a light-duty position. Several weeks later, Ebberts contacted Dr. Tillema and provided him with three job descriptions for light-duty positions which IBP believed Tovar could perform. Those positions involved sorting excess fat from the belt, picking loin wing bottoms and picking trim from the bone belt. Dr. Tillema examined Tovar on July 10, 1990, and concluded that each of the three positions was "quite appropriate." Tovar apparently returned to work in one of the positions but on August 7, 1990,

visited Dr. Tillema with complaints of job-related pain. Dr. Tillema indicated that she appeared to have a "quite appropriate job" and that she should "carry on with her light work."

On September 14, 1990, Tovar reported to Dr. John Wertzberger (another orthopedic surgeon) with similar complaints of pain. Dr. Wertzberger asked Tovar to return to her light-duty position in anticipation of fitting her with a low back brace in the future.

Tovar was absent from work beginning August 29, 1990, and continuing at least through September 17, 1990. Tovar contends that she was off work pursuant to doctor's instructions. Plaintiff's response in Opposition to Defendant's Suggestions in Support of Motion for Summary Judgment, p. 21, para 5. The record indicates, however, that Drs. Tillema and Wertzberger had concluded that

Tovar should continue with light duty-work. On September 17, 1990, IBP personnel manager Rodger Brownrigg wrote a letter to Tovar asking her to come in and talk to him about her absence, stating that her failure to do so would result in her termination.[1]

On September 25, 1990, Ebberts completed Tovar's vocational rehabilitation plan pursuant to K.S.A. §44-510g(e)(1). The objective of the plan was for Tovar to return to work at IBP with certain accommodations. Ebberts noted that IBP had offered Tovar a

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[1] Tovar also claims that on October 1, 1990, Nancy Downs visited her at home and threatened to fire her if she did not report to work. The only evidence which Tovar submits to support this assertion, however, is a letter dated October 1, 1990, from her attorney, David O. Alegria, to IBP in-house counsel, Gary Korte, in which Alegria states that Tovar telephoned and gave him this information. Such letter is inadmissible hearsay and will not be considered by the Court on the motion for summary judgment.

position within her physical capabilities, that tovar wanted to return to that position, and that while Tovar continued to complain of pain, physicians had been unable to document a medical cause for the pain. Ebberts further noted that in spite of prior disruptions in Tovar's work service, IBP "continue[d] to work with Mrs. Tovar in an effort to assist her in returning to full time employment." The report continued as follows:

> It should be noted that Dr. Tillema, as well as Dr. Wertzberger have released Ms. Tovar to work part time (4 hours per day, 5 days per week). In order to maintain her employment with IBP it is important for Ms. Tovar to attempt to work four hours per day. Should she choose not to attempt to work four hours per day, the alternatives are: request a leave of absence, quit or be fired.

Ebberts also outlined Tovar's responsibilities under the plan as follows:

1. Maintain regular contact with counselor by phone.
2. Alert counselor of any changes

in her physical condition.

3. Participate fully in vocational rehabilitation plan.

The Assistant Rehabilitation Administrator approved the plan on October 8, 1990.

Dr. Wertzberger had previously asked Tovar to return to her light-duty job. Nonetheless, on September 28, 1990, he gave her a four-week off-work slip stating that she was under his care for herniated lumbar disc and could return to work on approximately October 29, 1990. On October 29, 1990, Tovar returned to Dr. Wertzberger for further evaluation. In his records of the October 29 visit, Dr. Wertzberger made the following note:

> [Emma] apparently was in court and is wanting to remain off work and take a visit to her mother. I told her that I could not comply with that request. We are now in the process of getting her fitted for a brace and I want her to continue with therapy and return to light duty in three weeks. . . . She appears to be insistent upon maximizing her problem rather than working toward getting better. . . .

Dr. Wertzberger nonetheless gave Tovar a

four-week off-work slip with a work return date of November 26, 1990.

On November 23, 1990, Tovar returned to Dr. Wertzberger. At that time he provided another four-week off-work slip, with a work return date of December 29, 1990. On November 26, 1990, IBP in-house attorney Gary Korte sent Dr. Wertzberger a picture of IBP employees performing the trim job and a description of the job, in order to aid Dr. Wertzberger's evaluation of Tovar. In that letter, Korte also discussed the possibility of a plant tour for Dr. Wertzberger.

On December 28, 1990, Tovar returned to Dr. Wertzberger for further evaluation. At that time he provided her with a six-week off-work slip. On February 8, 1991, Tovar again returned to Dr. Wertzberger. At that time he noted a diagnosis of spinal stenosis and executed an eight-week off-work slip with a work return date of

May 11, 1991.

On February 18, 1991, Korte asked Dr. Wertzberger for documentation explaining why Tovar had been off work for so long. Korte also expressed concern that there may be no solution to Tovar's problem. By letter dated March 8, 1991, Dr. Wertzberger advised Korte that while Tovar could not work in a captive sitting position, she could possibly perform a position which would allow "both sitting and standing, with minimal lifting and bending."

On April 2, 1991, Korte wrote to Dr. Wertzberger inquiring whether Tovar had reached a medically stable condition and, if so, requesting a functional impairment rating on Tovar as well as any long-term recommendations. Shortly thereafter, on April 4, 1991, Dr. Wertzberger informed IBP that Tovar had reached a medically stable condition. On April 22, 1991,

Tovar, returned to Dr. Wertzberger for evaluation and treating of her permanent disability. Based on that evaluation, Dr. Wertzberger gave Tovar a six-month off-work slip, until October 21, 1991. He also informed IBP that while Tovar could not return to her previous work, she might be able to carry out a portion of her work activities "if she were capable of standing and sitting intermittently without the necessity of repetitive twisting maneuvers."

IBP questioned the fact that Dr. Wertzberger had taken Tovar off work for six months, when all previous off-work periods had been for four to eight weeks at a time.

During the time that Tovar was off work pursuant to Dr. Wertzberger's instructions, Korte wrote a total of five letters to Dr. Wertzberger regarding Tovar's being off work. Dr. Wertzberger

considered IBP's interest in Tovar's condition to be "unusual" but he testified that IBP did not interfere with her treatment.

On May 10, 1991, IBP personnel director Rodger Brownrigg completed a medical leave of absence form for Tovar for the period of time beginning October 29, 1990, leaving blank the space for an ending date.[2]

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[2] Tovar claims that under the leave of absence form, she could have remained off work until October 29, 1991. IBP Policy No. 107 recognizes three types of leave (medical, personal, and military) and requires that all leave of absence requests be "filed in writing by the employee" on a prescribed form. With respect to medical leave, Policy 107 provides in relevant part as follows:

> Regular employees, who through a written statement from his/or her physician, expects [sic] to be off work in excess of five (5) days shall be granted a medical leave of absence. The maximum length of a medical leave is twelve (12) months. Written statement s will include beginning and ending of leave and diagnosis of reason for

On May 24, 1991, Ebberts provided Dr. Wertzberger a job analysis for a position picking trim from the bone belt and asked

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leave. * * *

> An employee off work due to extended illness or injury shall be kept on the payroll in a leave of absence status for a period not to exceed twelve (12) months from the last day of active work.

Under the policy, when a doctor releases an injured employee to return to work, the employee must return to work and attempt to perform the job. If the employee believes that notwithstanding the medical release she cannot perform the job, and so informs IBP, the employee may receive a medical leave of absence. Such leaves are negotiated on a case by case basis and in each case, the employee is responsible for keeping IBP apprised of current medical information and work plans.

Tovar claims that the medical leave policy is selectively enforced and discriminatorily applied to terminate employees who exercise their legal rights under the Workers' Compensation Act. The record is devoid of evidence, however, that Tovar ever requested a leave of absence under Rule 107, or that after Dr. Wertzberger released her to work, Tovar communicated any request for medical leave due to extended pain, illness or injury.

him to "evaluate the position for appropriateness in regards to Ms. Tovar's physical condition and ability to return to work." Ebberts sent copies of her letter to both Tovar and Tovar's attorney, David O. Alegria. On May 31, 1991, Dr. Wertzberger replied to Ebberts as follows:

> Dr. Tillema and I agree on her functional capacity capabilities, and I would advise progressing into a full-time work activity over approximately two months. I have personally observed the particular job and agree that it is highly sedentary, requiring the ability to intermittently change positions, turn around or move in the work space, while continuing to comply with the job requirements.
>
> Based on my observations of this task I would conclude that Ms. Tovar will be capable of working into a full-time work activity over the next two months.[3]

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[3] Dr. Wertzberger had toured the Emporia plant with Korte on May 11, 1991 to familiarize himself with the jobs available and view the various accommodated positions for injured employees. At that time he personally watched an IBP employee perform the job of picking fat from the trim belt. IBP informed Dr. Wertzberger that the position

Without re-examining Tovar, Dr. Wertzberger released her to try the position for four hours a day, working into full time activity over a two-month period.

On June 13, 1991, Ebberts informed IBP that Dr. Wertzberger had released Tovar to work on a part-time basis, confirmed that the position was available, and informed Alegria that Tovar should report for work on June 17, 1991. Ebberts also communicated this information to Tovar by mail. After the work return date had passed, on June 19, 1991, Alegria wrote to Korte.

He enclosed a letter from Dr. Wertzberger which postponed Tovar's

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could be re-designed for Tovar so as to eliminate the need for twisting maneuvers, with the opportunity to sit and stand intermittently during the course of the job performance. Although Dr. Wertzberger did not actually view the accommodated job, he concluded that Tovar was physically capable of performing it.

release date to July 1, 1991 -- not because the earlier release date had been premature but because Tovar had been out of the country on that date. Alegria represented that Tovar would return to IBP on July 1, 1991.

Tovar returned from Mexico on June 23, 1991, and learned that she was to report for work on July 1, 1991. Tovar did not report to work, however, allegedly because of in pain. Instead, on July 10, 1991, Tovar reported to Dr. Wertzberger and requested a letter stating that she could not work. Dr. Wertzberger refused to provide such a letter. His notes of that visit are as follows:

> Emma returned from Mexico. She wants a letter stating that she cannot work. Actually I sent a letter to Mr. Korte saying that I thought she could pick fat. Emma finished the thing saying that she does not "want to work in pain."
>
> Ms. Tovar has problems and obviously requires an accommodation to her physical and spinal stenosis but I

> believe she is capable of the most sedentary work activity I can imagine, based on my observations of the picking fat job.

Korte received a copy of Dr. Wertzberger's notes from the July 10 visit.

On July 25, 1991, Ebberts prepared a Vocational Progress Plan Report which noted that she had been unable to reach Tovar or determine her intent with respect to returning to work, and that she was awaiting further information from Alegria. In late July, 1991, Brownrigg learned that Tovar had not returned to work despite her medical release. According to IBP attendance policies, IBP could terminate employees after three no-call/no-show dates. Brownrigg therefore informed Korte that Tovar would be terminated for job abandonment. Korte suggested a two-week waning letter, as an alternative, and he sent such a letter to Alegria on August 2, 1991. In that letter, Korte noted that

the plant was "totally and completely unaware of Ms. Tovar's whereabouts," and that if Tovar did not return within two weeks, i.e. by August 16, 1991, she would be terminated. Tovar was aware of Korte's letter and the August 16 deadline but, instead of return to work on that date, left for Mexico on August 10, 1991.

On August 16, 1991, Alegria contacted Korte to report that he was having difficulty contacting Tovar. Alegria requested additional time to get Tovar back to work. In response, Korte extended Tovar's deadline to August 19, 1991. Tovar did not appear at IBP on August 19, 1991, and IBP terminated her employment.

On August 26, 1991, Tovar showed up for work unannounced. She met with Downs, who informed her that the job had been terminated and that she should call her attorney.

At the time of her termination and on

August 26, 1991, IBP had suitable work available which Tovar could perform.

IBP claims that Tovar had no communications with IBP after the July 1, deadline, either personally or through her attorney. Tovar, on the other hand, insists that whenever IBP asked her to return to work, she either reported for work or communicated to Nancy Downs that she was unable to do so. Tovar cannot specifically recall any particular communication with Downs, however, and her deposition testimony on this issue is extremely vague and grossly contradictory.[4]

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[4] Although at one point Tovar claimed to have contacted Downs between July 1 and August 26 regarding her return to work, Tovar contradicted herself numerous times with respect to this fact. Tovar first stated that she thought she had been in contact with IBP during the month of July, 1991; however, she stated that she was not in the plant during that month and she did not remember talking or sending a letter to anyone at IBP. Tovar depo., p. 46. She then stated that she had been in contact with IBP between July 1 and August 26, 1991, because every time

Downs maintains that her only contact with Tovar throughout the entire summer of 1991 occurred on August 26, 1991, when Tovar showed up unexpectedly for work.[5]

Since her termination, Tovar has sometimes suffered loss of appetite and sleeplessness.

B. Discussion

Kansas law recognizes a public policy

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IBP requested that she report to work, she went and talked to Nancy Downs. Tovar depo., p. 49-50. Next, Tovar said that although she could not remember the exact date, she "thinks" that she spoke to Downs because "[e]very time IBP called [her] and told [her] that [she] had to talk to them, [she] went and talked to them." Tovar depo., p. 51-52. Finally, Tovar stated that it was "possible" that she had talked to Downs.

[5] Tovar points out that Downs testified in the workers' compensation hearing that she had been dealing with Tovar face-to-face in getting her back to work up until the time she was terminated. Although this testimony may arguably create a fact issue as to the extent of communication between Tovar and Downs, the Court finds it is not clear and convincing evidence to support that Tovar communicated with Downs regarding her absences after July 1, 1991.

exception to the employment-at-will doctrine for employees discharged in retaliation for the exercise of their rights under the Workers' Compensation Act. Murphy v. City of Topeka, 6 Kan.App. 488, 630 P.2d 186 (Kan. App. 1981). The cause of action extends to an employee who is fired for being absent or failing to call in an anticipated absence as the result of a work-related injury. Coleman v. Safeway Stores, Inc., 242 Kan. 804, 816, 752 P.2d 645, 652 (1988). Nevertheless, an employer may terminate an injured employee pursuant to a neutral attendance policy where the employee is unable to perform the job and where the employer does not have suitable work available which the employee can perform. See Raymond v. Archer Daniels Midland Co., 762 F.Supp. 901, 904-905 (D. Kan. 1991); Rowland v. Val-Agri, Inc., 13 Kan.App.2d 149, 152, 766 P.2d 819, 822 (Kan. App.

1988); Murphy 6 Kan.App. at 490. Obviously, the employer can also terminate an employee who refuses to perform suitable work.

On September 27, 1993, the Court certified the following question to the Kansas Supreme Court:

> Where an employee-at-will claims that an employer terminated his or her employment in retaliation for the exercise of statutory rights under the Workers' Compensation Act, K.S.A. §44-501 et seq., and that he or she is therefore entitled to maintain a cause of action for wrongful discharge under Kansas law, is plaintiff required to prove that claim by clear and convincing evidence?

The Kansas Supreme Court answered in the affirmative. Ortega v. IBP, inc., ___ P.2d. ___, 1994 WL 221601, No. 70,408, p.25 (Kan. 1994). Thus, Tovar must prove her claim for retaliatory discharge by clear and convincing evidence.

Under Kansas law, clear and convincing evidence is not a quantum of

proof, but rather a quality of proof. Barbara Oil Co. v. Kansas Gas Supply Corp, 250 Kan. 438, 827 P.2d 24, 32 (1992). In other words, plaintiff must establish her claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. Id. The Kansas Supreme Court has given the following definition of clear and convincing evidence:

> [T]he witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; ;and the witnesses must be lacking in confusion as to the facts at issue.

Nordstrom v. Miller, 227 Kan. 59, 65, 605 P.2d 545 (1980) (citation and quotations omitted).

In order to establish a prima facie case of retaliatory discharge, plaintiff must show (1) that she filed a claim for

workers' compensation benefits or sustained an injury for which she might assert a future claim for such benefits; (2) that ibp had knowledge of plaintiff's compensation claim or the fact that she had sustained a work-related injury for which she might file a future claim for benefits; (3) that IBP terminated her employment; and (4) that a causal connection existed between the protected activity or injury, and the termination. See Courter v. K-Mart Corp., 1988 WL 219717, *3 (D. Kan. 1988); Pilcher v. Board of Co. Commissioners of Wyandotte Co., 14 Kan.App.2d 206, 213, 787 P.2d 1204 (Kan. App. 1990).

Once plaintiff presents a prima facie case, the burden of production shifts to defendant to rebut the inference that its motives were retaliatory, by articulating a legitimate, non-retaliatory reason for

the discharge.[6] If the employer meets this burden of production, the presumption of the prima facie case is rebutted and drops from the case. St. Mary's Honor Center v. Hicks, 113 S.Ct. at 2749. Ultimately, plaintiff's burden is to show that the discharge was "based on" the exercise of rights under the Workers' Compensation Act (or a work-related injury for which she might thereafter file a claim for benefits).[7] See Brown v. United Methodist

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[6] In its certification opinion, the Kansas Supreme Court noted that Kansas courts utilize the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), for discrimination and free speech employment cases. See Ortega, No. 70,408 at pp. 22-23. The Court believes that Kansas courts also would apply the McDonnell Douglas framework to workers' compensation retaliatory discharge cases.

[7] As a practical matter, the Court believes that Kansas courts would interpret this test analogously to the federal employment discrimination cases which require that the retaliatory intent be "a motivating factor" in the termination decision. See Ortega v. IBP, inc., ___ p.2d at ___, 1994 wl 221601, no.

Homes for the Aged, 249 Kan. 124, 147-148, 815 P.2d 72, 88 (1991).

Tovar claims that IBP terminated her employment on August 19, 1991, in retaliation for the filing of her workers' compensation claim two years earlier, on August 15, 1989. To establish a prima facie case Tovar must show (1) that she filed a claim for workers' compensation benefits; (2) that IBP had knowledge of such claim; (3) that IBP terminated her employment; and (4) that a causal connection existed between the protected activity and the termination of her employment. The first three elements are not disputed. As to the fourth element - causal connection - Tovar has failed to produce clear and convincing evidence to establish a prima facie case. The undisputed facts reveal that Tovar knew

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70, 408, p.23 (citing Larson v. Ruskowitz, 252 Kan. 963, 850 P.2d 253 (1993)).

that Dr. Wertzberger had released her to begin part-time work, and that IBP expected her to report to work on July 1 and August 16.[8] Tovar failed to report to work on those dates, and she has not shown by clear and convincing evidence that her absences was legitimately due to any work related injury.

Tovar claims alternately that she did not report to work because (1) she had a statutory right to not work in pain; (2) she had the right to refuse to participate in a work hardening program, which she characterizes as "medical treatment"; and (3) in 1989 or 1990 Greg Stromgren had told her not to return to work until she felt okay to do her regular job. Tovar has provided no authority to support her claim that she had a statutory right to not work in pain. The Court is aware of

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[8] The record is unclear whether Tovar knew of the August 19 extension.

none. Likewise, Tovar has failed to support her proposition that Dr. Wertzberger's release for part-time work was "medical treatment" and, if so, that she had the right to refuse such treatment. Finally, no jury could reasonably conclude that Tovar entertained a reasonable belief that she could refuse to report to work because of Stromgren's alleged statement one to two years earlier - especially in light of IBP's clear demands that she report to work.

Under Kansas law, an employee is not vested with an absolute guarantee of employment merely because she has sustained a work-related injury. Moreover, even if Tovar had a valid excuse for not reporting to work, she has failed to produce clear and convincing evidence that she communicated any such excuse to IBP. In light of Dr. Wertzberger's medical release, IBP's demands that tovar

report to work, and the lack of clear and convincing evidence that Tovar communicated to IBP any reason for her absence, no reasonable jury could infer that IBP could reasonably anticipate that Tovar would be absent as the result of a work-related injury. To the contrary, the only reasonable inference on this record is that IBP lawfully terminated Tovar's employment pursuant to its no-call/no-show policy.

Tovar argues that Korte's effort, with Dr. Wertzberger, to get Tovar back to work demonstrate retaliatory intent. Tovar, however, points to nothing unreasonable about Korte's communications with Dr. Wertzberger. Finally, Tovar attempts to show that IBP fosters a "hostile working environment" for injured workers.[9] Tovar has failed, however, to

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[9] Tovar alleges the following facts concerning IBP workers' compensation

policy:

IBP is self-insured for workers' compensation purposes and utilizes in-house counsel for its workers' compensation work. IBP keeps track of workers' compensation costs, and sets an annual goal of $350.00 per person.

At some time not specified in the record, IBP had safety incentive programs to reward departments that went for periods of time with no injuries. Mike Fiehler, general manager of the IBP plant in Emporia, was aware of situations in 1992 in which some IBP employees pressured or got mad at employees that reported injuries. IBP has a profit-sharing program. Employees have been told that if there are less injuries there will be more profits and bonuses in everybody's pockets.

Mr. Russell, an ex-IBP employee who supervised Tovar at one time but had nothing to do with her termination, testified that "[i]t's a fairly common practice at IBP that if somebody has suffered an injury that is going to be long-term that they find a reason to dismiss them.: Mr. Russell said he was told to observe employees who had sustained injuries and to report back anything they might have done. Specifically, he was told to watch an injured employee named Curtis Repp, who was eventually fired for destruction of company property.

Jennifer Domkowski, a lead person for IBP, stated that when she attended daily

produce clear and convincing evidence to support a reasonable inference that any such tactics were the motivation behind

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meetings from approximately January to May, 1993, she twice heard Bob Wallace (supervisor of the supervisors, and Tovar's supervisor at the time she was fired) tell the supervisors to get rid of anyone who got hurt. He said that he did not care how they did it. but to just get rid of the injured employee. Domkowski also stated that the trim belt (the job Tovar was assigned to return to) is known as the "firing belt" because IBP places the injured employees there until it finds a pretext to fire them because of their work injury.

IBP investigates workers' compensation claimants who are suspected of filing fraudulent claims.

Out of the employees that IBP terminates after work-related injuries, 42 percent are fired within 30 days of the date of injury, four percent are fired between 40 to 60 days from the date of injury, and 35 percent are fired 90 days or more after the date of injury. Tovar does not provide the overall percentage of injured employees who are fired, however, nor does she give the overall percentage of non-injured employees who are terminated generally. Thus, without being able to compare the turnover rate of injured employees to that of non-injured employees, the numbers provided by Tovar are meaningless to the Court.

her termination.

In other contexts, Tovar has complained that the Court has effectively eliminated her right to a jury trial by excluding all evidence as to other retaliatory conduct by IBP, specifically, by disallowing the testimony of 36 former IBP employees who would provide anecdotal evidence of a pattern and practice of retaliation by IBP. See Brief of Plaintiffs, pp. 9-10, Ortega v. IBP, inc., No. 70,408 (Kan. 1994). On August 4, 1993, the Court struck 36 individuals from plaintiff's witness list. Plaintiff represented, in boilerplate language, that each of the witnesses would testify

> . . . regarding defendant's pattern and practice of retaliation against employees injured as a result of work related accidents; defendant's underhanded means of terminating employees as a result of employees' work related accidents; defendant's activities designed to harass and mistreat injured workers; defendant's procedures to obstruct injured employees' ability to obtain workers'

> compensation benefits; and hostility towards him or her with regard to his or her own workers' compensation claim.

Plaintiff made no effort to establish that any such witness worked in the Emporia plant, at any relevant time period, or in any relevant work situation. Therefore, based on boilerplate and cumulative description provided by plaintiff, the Court found that the probative value of such testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and considerations of undue delay, waste of time, and needless presentation of cumulative evidence. Order (Doc. #110). Out of an abundance of caution, however, the Court allowed plaintiff until August 10, 1993, to articulate with specificity a subject of proposed testimony on which said witnesses might properly testify. Plaintiff

provided none.

As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's retaliatory intent. Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990). However, plaintiff must demonstrate that the circumstances of the employees are such that their statements can "logically or reasonably be tied to the decision to terminate [the plaintiff]." Id. at 1156-1157 n.2 (quoting Schrand v. Federal Pacific Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988)). Here, Tovar has failed to establish any circumstances surrounding the 36 individuals, let alone that their circumstances are such that their anecdotal testimony may reasonably be tied to the decision to terminate tovar. Moreover, the Court did not excluded all evidence of a pattern and practice of

retaliation by IBP. The Court allowed Tovar's discovery requests for information on IBP employees who within the last three years had filed workers' compensation claims and were terminated by IBP, which allowed plaintiff access to information relating to statistical disparate treatment. See Journal Entry (Doc. #67), April 30, 1993, p. 6.

On this record, Tovar has failed to provide clear and convincing evidence of a causal connection between her filing a workers' compensation on August 15, 1989, and her termination on August 19, 1991. Defendant's motion for summary judgment should therefore be sustained as to plaintiff's claim for retaliatory discharge.

As a matter of law, there is no evidence to support Tovar's claim that IBP's actions were extreme and outrageous, or willful and wanton, or that Tovar has

suffered severe emotional distress. Defendant's motion therefore should also be sustained as to Tovar's claims for intentional infliction of emotional distress and punitive damages. See Anspach v Tompkins Ind., Inc., 817 F.Supp. 1499, 1506-1509 (D. Kans 1993).

**IT IS THEREFORE ORDERED** that Defendant IBP inc.'s Motion for Summary Judgment (Doc. #94) against plaintiff Emma Tovar should be and hereby is sustained.

Dated this 30th day of June, 1994 at Kansas City, Kansas.

Kathryn H. Vratil
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

---

EMMA TOVAR,

Plaintiff - Appellant,

and

ARNOLDO ORTEGA

Plaintiff,

v.

IBP, INC.,

Defendant - Appellee.

Nos. 94-3263
and 94-3384
D. Kansas
(D.C. No. 92-2351-KHV)

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**ORDER AND JUDGMENT***

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Before **SEYMOUR**, **PORFILIO**, and **ANDERSON**, Circuit Judges.

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Emma Tovar appeals from a summary judgment and resulting dismissal of her

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

retaliatory discharge action against IBP, Inc. She contends that the district court erred by applying a clear and convincing evidence standard of proof, and that genuine issues of material fact preclude summary judgment. Both in her briefs on appeal and in oral argument by counsel, Ms. Tovar stresses that the focus should be on the motives and intent of IBP, not on her actions or inaction.

In Ortega v. IBP, Inc., 255 Kan. 513, 528, 874 P.2d 1188 (1994), the Kansas Supreme Court, responding to a certified question regarding the burden of proof in a retaliation case, stated:

> A party having the burden of proving a discharge from employment in retaliation for having filed a workers compensation claim must establish that claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. It is clear if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it.

While the outer perimeter of this standard may be elusive, the district court was easily within int in this case. See Memorandum and Order dated June 30, 1994, pp. 13-14.

We have considered the record and the arguments of counsel and conclude that the district court did not err. We AFFIRM the district court substantially for the reasons set out in its thorough Memorandum and Order of June 30, 1994.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| EMMA TOVAR, | ) | |
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| Plaintiff - Appellant, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| ARNOLDO ORTEGA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Nos. 94-3263 |
| | ) | 94-3384 |
| v. | ) | |
| | ) | |
| IBP, INC., | ) | |
| | ) | |
| Defendant - Appellee. | ) | |

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ORDER
Entered July 8, 1996

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Before SEYMOUR, Chief Judge, PORFILIO, and ANDERSON, Circuit Judges.

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This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judge of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

Patrick Fisher, Clerk

By L. Balzano
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

No. 96-549

In The

# Supreme Court of the United States

October Term, 1996

EMMA TOVAR

*Petitioner,*

vs.

IBP, inc.,

*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

## BRIEF IN OPPOSITION

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29 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether any federal constitutional rights are implicated by the Kansas Supreme Court's imposition of a clear and convincing evidence standard of proof in a common law cause of action for discharge in retaliation for exercise of rights under a state Workers' Compensation Act.

2. Whether consideration of the clear and convincing evidence standard in ruling a motion for summary judgment on a state common law cause of action is appropriate under Federal Rule of Civil Procedure 56 as construed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202 (1986).

## RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent IBP, inc. states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and their attorneys.

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## BRIEF IN OPPOSITION

The Respondent, IBP, inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

## STATEMENT OF THE CASE

This civil action was one for retaliatory discharge and intentional infliction of emotional distress brought under Kansas state law in which plaintiff employee alleged that she was discharged from her employment with defendant/respondent on August 19, 1991 in retaliation for having two years earlier filed a workers' compensation claim. Subject matter jurisdiction in the United States District Court for the District of Kansas was premised solely on diversity of citizenship.

After the close of discovery, defendant filed its motion for summary judgment on July 12, 1993. The motion was fully briefed by both parties by the end of August 1993. On September 27, 1993, the district court certified to the Kansas Supreme Court an issue of Kansas substantive law – whether an employee-at-will making a claim for termination in retaliation for exercise of statutory rights under the Kansas Workers' Compensation Act must prove her claim by clear and convincing evidence. The Kansas Supreme Court on May 27, 1994 in *Ortega v. IBP, inc.*, 255 Kan. 513, 874 P.2d 1188, answered affirmatively, holding that under Kansas law, a plaintiff is required to prove a claim for retaliatory discharge by a

preponderance of the evidence that is "clear and convincing in nature."

The district court then granted defendant's motion for summary judgment by Memorandum and Order dated July 1, 1994. (That decision is reported at 1994 WL 373887 (D.Kan. July 1, 1994)). Judgment was entered in favor of defendant on plaintiff's state law claims on September 27, 1994. Plaintiff appealed the entry of summary judgment to the United States Court of Appeals for the Tenth Circuit, which affirmed in an unpublished Order and Judgment dated May 29, 1996. The appellate court cited to the burden of proof in a retaliation case established by the Kansas Supreme Court in *Ortega v. IBP, inc.*, 255 Kan. at 528 – preponderance of the evidence, but the evidence must be clear and convincing in nature. It then concluded that "while the outer perimeter of this standard may be elusive, the district court was easily within it in this case." The Tenth Circuit affirmed "substantially for the reasons set out" in the district court's June 30, 1994 Memorandum and Order.

In her Statement of The Case, plaintiff/petitioner sets out very few of the relevant facts that were before the district court in the briefing on the defendant/respondent's motion for summary judgment. The pertinent facts were as follows.

Plaintiff was employed at defendant's Emporia, Kansas plant from May 15, 1975 until her termination on August 19, 1991. (Aplee.Supp.App. at 2). Following a work-related injury to her back which occurred on April 14, 1989, plaintiff filed a Kansas workers' compensation

claim on or about August 15, 1989. (Aplee.Supp.App. at 4).

During 1989 and 1990, plaintiff was treated by Dr. David Tillema and Dr. John Wertzberger, orthopedic surgeons. Both physicians imposed light duty work restrictions on plaintiff, including no frequent bending or stooping, no lifting over 15 pounds, and no pushing or pulling. (Aplee.Supp.App. at 10). On April 10, 1990, the Administrative Law Judge ordered plaintiff referred for vocational rehabilitation assessment for the purpose of an evaluation and for a report on the need for vocational rehabilitation services. (Aplee.Supp.App. at 17-18). On April 17, 1990, plaintiff's vocational rehabilitation case was referred by defendant to Kansas Rehabilitation and Clinical Consultants ("KRCC"). (Aplee.Supp.App. at 20). On May 29, 1990, Ms. Ebberts of KRCC completed plaintiff's vocational assessment/evaluation. This evaluation noted that plaintiff's "[c]urrent restrictions limit her physical activity to a light duty position . . . " (Aplee.Supp.App. at 24).

On July 10, 1990, plaintiff saw Dr. Tillema for evaluation. Dr. Tillema concluded that each of three light duty positions at defendant's plant were "quite appropriate for this patient." Dr. Tillema completed a Work Capacities Form indicating that plaintiff had reached maximum medical improvement and releasing her to return to work at defendant part-time for two weeks and then full time. Ms. Ebberts, who had undertaken the management of plaintiff's return to work, met with plaintiff at defendant's Emporia plant on July 18, 1990 to observe the picking position. In her Rehabilitation Vendor Progress Report dated July 27, 1990, Ms. Ebberts noted that "[i]t is

anticipated that Ms. Tovar will be able to return to her same employer/another job." (Aplee.Supp.App. at 30-34).

On September 25, 1990, Ms. Ebberts completed plaintiff's Vocational Rehabilitation Plan pursuant to K.S.A. 44-510g. The plan priority selected was for plaintiff to return to work at defendant with accommodation. Ms. Ebberts stated that "the employer has offered a position to plaintiff which fits within her physical capabilities . . . " The report further noted that in spite of plaintiff's numerous absences from work, defendant "continues to work with Mrs. Tovar in an effort to assist her in returning to full time employment." The report continued further:

> It should be noted that Dr. Tillema, as well as doctor Wertzberger have released Ms. Tovar to work part time (4 hours per day, 5 days per week). In order to maintain her employment with IBP it is important for Ms. Tovar *to attempt to work four hours per day*. Should she choose not to attempt to work fours hours per day, the alternatives are: request a leave of absence, quit or be fired. (Emphasis added).

The September 25, 1990 rehabilitation plan identified plaintiff's responsibilities as follows:

> 1. Maintain regular contact with counselor by phone.
>
> 2. Alert counselor of any changes in her physical condition.
>
> 3. Participate fully in vocational rehabilitation plan.

The vocational rehabilitation plan was approved by the Assistant Rehabilitation Administrator on October 8, 1990. (Aplee.Supp.App. at 40-42).

From September 28, 1990 through May 31, 1991, Dr. Wertzberger provided plaintiff with several off work slips. (Aplee.Supp.App. at 44, 49-50, 52-53, 55-56, 58-59, 61-62). On May 11, 1991, Dr. Wertzberger visited the defendant's Emporia plant to generally observe and familiarize himself with the types of jobs available at the plant. (Aplee.Supp.App. at 79). At that time, he was able to observe an accommodated picking fat position defendant planned to make available to plaintiff. (*Id.*)

On May 24, 1991, Ms. Ebberts wrote to Dr. Wertzberger providing him with a job analysis for the picking trim from belt position that defendant had made available to plaintiff. She informed Dr. Wertzberger that the job involved:

> "remove trim from the bone belt and put into the trim belt (trim belt located directly next to bone belt). The weight of the lean trim is arranged from 2 ounces to the maximum of 1 pound. This position can be done with one hand, it can be done sitting down and requires no heavy lifting. This position also can accommodate frequent breaks. The position requires minimal to no twisting or bending. Iowa Beef Processors' has made this position available for Mrs. Tovar at this time."

Ms. Ebberts asked Dr. Wertzberger to fill out a Work Capacities Form and "evaluate the position for appropriateness in regards to Ms. Tovar's physical condition and ability to return to work." Ms. Ebberts copied this

letter to plaintiff's attorney, David Alegria, and to plaintiff, as she did with all her correspondence. (Aplee.Supp.App. at 85-86). Plaintiff testified that when she received letters from Ms. Ebberts, her son read them to her. (Aplee.Supp.App. at 89).

On May 31, 1991, Dr. Wertzberger replied to Ms. Ebberts enclosing the completed Work Capacities Form. The letter stated as follows:

> "I received your information related to IBP's attempt to accommodate Mrs. Tovar's low back problems and complaints. I have reviewed the photograph which accompanied your Work Capacities Form and reviewed Dr. Tillema's evaluation. Essentially, Dr. Tillema and I agree on her functional capacity capabilities, and I would advise progressing into a full-time work activity over approximately two months. I have personally observed this particular job and agree that it is highly sedentary, requiring the ability to intermittently change positions, turn around or move in the work space, while continuing to comply with the job requirements.
>
> Based on my observations of this task, I would conclude that Mrs. Tovar will be capable of working into a full-time work activity over the next two months."

(Aplee.Supp.App. at 122). The enclosed Work Capacities Form indicated that in Dr. Wertzberger's medical opinion, plaintiff would reach a stable medical condition as of July 1, 1991 and that she was released to return to work to attempt the accommodated position at defendant four hours a day working into full time activity over a two-month period. (Aplee.Supp.App. at 123).

On June 13, 1991, Ms. Ebberts provided Mr. Gary Korte of defendant with the May 31, 1991 letter of Dr. Wertzberger and the Work Capacities Form. Ms. Ebberts advised that Dr. Wertzberger had released plaintiff to return to work on a part-time basis and that Ebberts had verified this through Dr. Wertzberger's office. Ms. Ebberts further indicated that defendant's Emporia plant would make the accommodated position available to plaintiff and that she had informed plaintiff's counsel that plaintiff was to report to work on June 17, 1991. This letter was copied to plaintiff. (Aplee.Supp.App. at 125-126).

On June 19, 1991, plaintiff's counsel wrote to Mr. Korte and advised that plaintiff "will return to work on July 1, 1991." (Aplee.Supp.App. at 128). Plaintiff's counsel enclosed a June 17, 1991 letter of Dr. Wertzberger. That letter indicated that since plaintiff had been out of the country at the time that Dr. Wertzberger had released her to work activities, Dr. Wertzberger concluded that July 1, 1991 was "a reasonable time for expecting Ms. Tovar to return to her work activities as modified by her employer." (Aplee.Supp.App. at 129). Ms. Ebberts also indicated in her June 25, 1991 Vocational Plan Progress Report that she had received Dr. Wertzberger's letter indicating that July 1, 1991 was a reasonable date for plaintiff to return to work. (Aplee.Supp.App. at 131).

Plaintiff returned from Mexico on June 23, 1991. (Aplee.Supp.App. at 134, 136). She received Ms. Ebberts' letter and the letter from her lawyer to Mr. Korte dated June 19, 1991 to which was attached Dr. Wertzberger's letter of June 17, 1991 and she was aware that both letters stated that she was to report to work for a light duty job

on July 1, 1991. (Aplee.Supp.App. at 91-92). Plaintiff understood from talking to Ms. Ebberts that the job she was going back to had been modified so she could perform it as light duty. (Aplee.Supp.App. at 105). Plaintiff understood and knew from talking to Ms. Ebberts that Dr. Wertzberger had gone out to the defendant's plant and looked at the job defendant had modified and that Dr. Wertzberger felt she could perform the job. (*Id.*)

Plaintiff did not return to work at defendant's plant to attempt the accommodated position on July 1, 1991 or at any time prior to August 26, 1991. (Aplee.Supp.App. at 91-92, 105). Plaintiff was in Emporia the entire month of July 1991 until August 10, 1991. (Aplee.Supp.App. at 96). Plaintiff did not contact anyone at defendant with respect to her return to work on July 1, 1991. Plaintiff was unable to recall any specific date or time when she contacted anyone at the plant between July 1, 1991 and August 26, 1991. (Aplee.Supp.App. at 101-105).

Although at one point during her deposition, plaintiff claimed to have contacted Nancy Downs, defendant's Workers' Compensation Coordinator, regarding her failure to return to work, she contradicted herself numerous times with respect to this alleged communication, as well as regarding alleged communications with Ms. Ebberts, her doctor and her attorney during the summer of 1991. First, plaintiff testified she did not talk to Nancy Downs from June 19, 1991 through August 26, 1991. (App.Supp.App. at 98-99). Then, after a break, she testified that she "was in contact with IBP". (Aplee.Supp.App. at 100). She conversely stated she does not remember what day she contacted Nancy Downs and she does not remember if it was before July 1, 1991. (Aplee.Supp.App.

at 93-94). Plaintiff does not remember whether she called anyone at defendant before July 1, 1991 to advise them she was not going to return to work. (Aplee.Supp.App. at 94). She does not remember whether she told her attorney before July 1, 1991 that she was not going to return to work. (Aplee.Supp.App. at 93-94, 103). She does not remember whether she told Dr. Wertzberger that she was not going to return to work for defendant before July 1, 1991. (Aplee.Supp.App. at 95). She does not remember talking to anyone on the phone or sending any letter to anyone at defendant during July 1991. (*Id.*) She does not remember talking to her attorney or to anyone in his office between June 19, 1991 and July 1, 1991. (Aplee.Supp.App. at 100). It is possible that she talked to Nancy Downs between June 19 and August 26, 1991, but she really does not know. (Aplee.Supp.App. at 103). She has no recollection or remembrance of what she possibly might have said to Nancy Downs. (Aplee.Supp.App. at 116). After she received her attorney's letter of June 19, 1991, she might have gone over and possibly talked to Nancy Downs but she is not positive about it one way or the other. (*Id.*)

In contrast, Nancy Downs unequivocally testified that she was not contacted by plaintiff during the summer of 1991 until after Downs' birthday on August 17, 1991. (Aplee.Supp.App. at 143, 144, 146, 150-157). If she had been contacted by plaintiff earlier, she would remember it. (Aplee.Supp.App. at 145). The last time she remembered talking to plaintiff was in 1989. (Aplee.Supp.App. at 147). She never talked to plaintiff on the phone. (*Id.*)

In her deposition, plaintiff contradicted herself with respect to her reasons for not returning to work at defendant after her doctors had released her to return. She testified that she did not return to work on July 1, 1991 because her back was hurting. (Aplee.Supp.App. at 108). A few minutes later, she testified she physically could have performed the picking fat light duty job in July 1991, but asserted that she did not return to work because in 1989 or 1990 "Greg Stromgren told me not to come back to IBP until I was okay to go to my regular job." (Aplee.Supp.App. at 112).

On July 10, 1991, plaintiff returned to Dr. Wertzberger's office. She requested a letter stating she could not work. Dr. Wertzberger declined to provide her with such a letter. After noting plaintiff's complaint that she did not want to work in pain, he wrote that plaintiff required an accommodation for her spinal stenosis, but that she was capable of performing the picking fat job based upon his personal observation. (Aplee.Supp.App. at 159). Plaintiff testified that when she went to Dr. Wertzberger's office on July 10, 1991 she believed she was physically able to perform the light duty job. (Aplee.Supp.App. at 112).

Based on Dr. Wertzberger's May 31, 1991 letter, Rodger Brownrigg, defendant's Personnel Director at the Emporia plant, believed that plaintiff could return to work on May 31, 1991. (Aplee.Supp.App. at 167). Subsequently, he received the letter from Dr. Wertzberger stating that July 1, 1991 was the appropriate return to work date. (Aplee.Supp.App. at 168). Once a treating physician releases an employee to return to work, defendant requires that employee to return to work. (Aplee.Supp.App. at 164).

It is defendant's policy that regardless of the reason, an employee must advise defendant when she is not going to be at work and the reason why. An employee cannot come and go as she pleases to work. (Aplee.Supp.App. at 139-142, 165).

Towards the end of July 1991, Mr. Brownrigg became aware that plaintiff had not returned to work at defendant despite having been released by her doctor to do so. (Aplee.Supp.App. at 168). According to defendant's attendance policies, plaintiff could have been terminated after three no call/no show absences. (Aplee.Supp.App. at 171-173). Mr. Brownrigg informed Mr. Korte that plaintiff would be terminated for job abandonment for failing to appear at the plant or to contact anyone at the plant regarding her return to work. Mr. Korte suggested a two-week notice letter. (Aplee.Supp.App. at 178-179). Subsequently, Mr. Korte drafted a letter to plaintiff's counsel dated August 2, 1991 which gave plaintiff two weeks notice to return to work or to be terminated. Mr. Korte indicated that as of August 2, 1991, the plant was "totally and completely unaware of Ms. Tovar's whereabouts. There has been no contact from your office or from Ms. Tovar to advise when or if she intends to return to work at IBP, inc. to the light duty position." (Aplee.Supp.App. at 183).

Plaintiff was aware of Mr. Korte's August 2, 1991 letter, but she failed to return to work within the two week deadline. (Aplee.Supp.App. at 109). She was in the United States at least until August 10, 1991, but then left for Mexico to visit her sick mother. (Aplee.Supp.App. at 109, 115, 134, 136).

On August 16, 1991, the final date of the two-week notice period, plaintiff's counsel contacted Mr. Korte and stated he was having difficulty contacting plaintiff. Plaintiff's counsel requested additional time to get plaintiff back to work. Mr. Korte agreed to give plaintiff until August 19, 1991. (Aplee.Supp.App. at 179-181).

Plaintiff failed to appear at defendant's Emporia plant on or before August 19, 1991 and she was terminated by Mr. Brownrigg on that date for job abandonment. The termination paperwork was completed on September 5, 1991. (Aplee.Supp.App. at 2, 192). Plaintiff came to the plant on August 26, 1991 and was told to contact her attorney who informed her of her termination. (Aplee.Supp.App. at 148).

Mr. Brownrigg terminated plaintiff because she failed to appear for work on July 1, 1991 and failed to contact her employer. Defendant gave her an additional two weeks to get back to work and she still failed to appear. (Aplee.Supp.App. at 169-170). Based upon an almost two and one-half month period during which plaintiff did not show up for work after she had been released by her physician to return to light duty work, Mr. Brownrigg testified defendant gave her "more breaks than we probably would have given anybody else." (Aplee.Supp.App. at 175).

Plaintiff concedes that when Dr. Wertzberger gave her an *off work slip* she followed his instructions but when he told her to go *back to work* to her light duty position, she did not follow his directions. (Aplee.Supp.App. at 113).

Plaintiff further concedes she did not tell anyone at defendant that she was going to Mexico in March, June or August of 1991. (Aplee.Supp.App. at 117).

Based upon her prior job experience with defendant, plaintiff was aware that, as an employee of defendant, if she desired to take time off she could not just do it on her own and show up for work when she chose. (Aplee.Supp.App. at 118). Plaintiff understood that she could be terminated for missing too much work. (Aplee.Supp.App. at 119).

Defendant has no financial incentive to terminate employees who suffer on-the-job injuries. In fact, the opposite is the case. There is no financial incentive to defendant to terminate an employee who has been injured on the job and who has filed a workers' compensation claim. If an injured worker is terminated, the indemnity reserve is raised by 50% because experience indicates claims for injured workers no longer employed are more expensive. (Aplee.Supp.App. at 222).

## REASONS FOR DENYING WRIT OF CERTIORARI

### I. SUMMARY OF ARGUMENT

This state common law cause of action for retaliatory discharge presented a fact-specific inquiry into the basis for the discharge of plaintiff for failure to return to work pursuant to the directions of her treating physicians. It does not raise any important issues of federal law. The substantive law applicable to the defendant's motion for summary judgment was Kansas law and, specifically, the

Kansas Supreme Court's holding in *Ortega v. IBP, inc.*, 255 Kan. 513, 874 P.2d 1188 (1994), that a plaintiff bears the burden in a retaliatory discharge case of establishing her cause of action by a preponderance of the evidence that is clear and convincing in nature. The district court correctly considered this higher evidentiary standard in ruling the motion for summary judgment. In particular, there was not evidence in the discovery record that reasonable jurors could have found, by a preponderance of the evidence that was clear and convincing in nature, established a causal connection between plaintiff's exercise of rights under the Kansas Workers' Compensation Act and defendant's discharge of plaintiff for job abandonment. The district court's entry of summary judgment in favor of defendant employer, affirmed by the United States Court of Appeals for the Tenth Circuit, did not deprive plaintiff of any constitutional right to jury trial, but rather complied fully with the requirements of Federal Rule of Civil Procedure 56, as construed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202 (1986).

## II. ARGUMENT

Plaintiff's principal grounds for seeking a writ of certiorari is the allegation that the district court and the Tenth Circuit Court of Appeals incorrectly imposed a clear and convincing burden of proof on plaintiff at the summary judgment stage of the litigation. However, because the inquiry regarding the existence of genuine issues of material fact under Federal Rule of Civil Procedure 56 necessarily implicates the substantive evidentiary standard of proof that would apply at trial, the

district court here properly decided the motion for summary judgment with reference to the clear and convincing burden.

Indeed, the district court acted with much care regarding the proper standard of proof. After the close of discovery and after the parties had fully briefed defendant's motion for summary judgment, the district court certified a question of state law to the Kansas Supreme Court – whether an employee-at-will claiming a termination in retaliation for exercise of statutory rights under the Kansas Workers' Compensation Act must prove that claim by clear and convincing evidence. *See Ortega v. IBP, inc.*, 1993 WL 463526 (D.Kan., September 27, 1993). The Kansas Supreme Court answered the certified question affirmatively. "A party having the burden of proving a discharge from employment in retaliation for having filed a workers compensation claim must establish that claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. It is clear if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it." *Ortega v. IBP, inc.*, 255 Kan. 513, 528, 874 P.2d 1188 (1994).

In deciding defendant's motion for summary judgment, the district court correctly referred to and applied the more rigorous clear and convincing evidentiary standard of proof. Federal Rule of Civil Procedure 56 mandates that evidence presented in support of and in opposition to a motion for summary judgment must be reviewed under the substantive law and evidentiary burden applicable to each claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91

L.Ed.2d 202 (1986); *Roskob v. IBP, inc.*, 810 F.Supp. 1229, 1230 (D.Kan. 1993), *aff'd*, 21 F.3d 1121 (10th Cir. 1994) (Table). Because on May 27, 1994 the Kansas Supreme Court established that the applicable evidentiary burden for a claim of retaliatory discharge under Kansas law is preponderance of the evidence that is clear and convincing and nature, this means that in opposing summary judgment on a state law retaliation claim, the plaintiff had the burden of producing evidence, which a reasonable jury could find to be clear and convincing, that the plaintiff was discharged in retaliation for pursuing workers' compensation benefits. *Malek v. Martin Marietta Corp.*, 859 F.Supp. 458, 465 (D.Kan. 1994). *Accord, Rosas v. IBP, inc.*, 869 F.Supp. 912, 915-917 (D.Kan. 1994).

Plaintiff confuses the question of what law governs in deciding a motion for summary judgment. The district court and court of appeals review evidence presented in a motion for summary judgment under the substantive law and based on the evidentiary burden that the non-moving party will face at trial on a particular claim. *John Hancock Mutual Life Insurance Co. v. Weisman*, 27 F.3d 500, 503-504 (10th Cir. 1994). However, because federal law controls the procedural aspects of a diversity case, the grant of summary judgment is controlled by the federal summary judgment rule as interpreted by federal courts. *Richardson v. Matthews*, 882 F.Supp. 6, 8 (D.Mass. 1995). What this means in the present case is that the Kansas Supreme Court decision in *Ortega v. IBP, inc.* provided the substantive law and mandated the evidentiary burden under which the district court was to review the evidence presented in support of and in opposition to the defendant's motion for summary judgment. In particular, plaintiff

would have the burden at trial of demonstrating by a preponderance of the evidence that is clear and convincing in nature that defendant discharged her in retaliation for exercise of rights under the Kansas Workers' Compensation Act. Plaintiff's evidentiary burden was to show, by evidence that reasonable persons could find to be clear and convincing, that the discharge was "based on" the exercise of rights under the Kansas Workers' Compensation Act. *Rosas v. IBP, inc.*, 869 F.Supp. at 916; *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 147-148, 815 P.2d 72 (1991).

Under Federal Rule of Civil Procedure 56, moreover, that substantive evidentiary standard had to be considered by the district court in evaluating the evidence presented in support of and in opposition to the motion for summary judgment. Summary judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to a judgment as a matter of law. Federal Rule of Civil Procedure 56(c). The party opposing summary judgment, plaintiff in the present case, must identify sufficient evidence that would require submission of the case to a jury. It is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will . . . preclude summary judgment." *Id.*, 477 U.S. at 248. If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. *Id.*, 477 U.S. at 251.

In reviewing the evidentiary record, the district court and court of appeals was required to evaluate that evidence under the clear and convincing evidentiary burden that would be applicable at trial to plaintiff's claim of retaliatory discharge. "Clear and convincing" evidence is such that "the witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts in issue." *Nordstrom v. Miller*, 227 Kan. 59, 65, 605 P.2d 545 (1980) (Citations and quotations omitted). Clear and convincing evidence is "certain and unambiguous, and plain to the understanding and so reasonable and persuasive as to cause the trier of fact to believe it." *Chandler v. Central Oil Corp.*, 253 Kan. 50, Syl. no. 5, 853 P.2d 649 (1993). Under Kansas law, clear and convincing evidence is not a quantum of proof, but rather a quality of proof. *Ortega*, 255 Kan. at 527, 874 P.2d 1188; *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 448, 827 P.2d 24 (1992). Plaintiff here does not directly challenge the Tenth Circuit Court of Appeals' conclusion that the district court's evaluation of the evidence relating to plaintiff's discharge and the reasons therefor was "easily within" the preponderance of the evidence that is clear and convincing in nature standard. Plaintiff did not present evidence that reasonable jurors could conclude was clear and convincing of a causal connection between the protected activity or injury, and the termination, which is essential to establish a prima facie case of retaliatory discharge under Kansas law. *Rosas v. IBP, inc.*, 869 F.Supp. at 916; *Pilcher v.*

*Board of County Commissioners*, 14 Kan.App.2d 206, 213, 787 P.2d 1204 (1990).

The uncontroverted facts presented below were that there was a two-year gap between filing of plaintiff's workers' compensation claim and termination, hardly a chronology that suggests a retaliatory motive on the part of the employer. During 1990 and 1991, plaintiff was off work for large blocks of time and her absences continued long after her treating physicians concluded that plaintiff could return to at least part-time work for defendant. During this same period of time, plaintiff was undergoing vocational rehabilitation and counseling, pursuant to the Kansas Workers' Compensation Act and at her request, which was aimed at returning plaintiff to the workplace. In early 1991, defendant and plaintiff's vocational rehabilitation counselor identified a modified, light duty job at the Emporia plant which was within the physical restrictions imposed on plaintiff by her treating physician, Dr. Wertzberger. This doctor toured that plant on May 11, 1991 and personally viewed the accommodated picking fat position which defendant had made available to plaintiff. On May 31, 1991, Dr. Wertzberger completed a medical evaluation and work capacities form in which he concluded that plaintiff could perform that job position, commencing immediately on a part-time basis and progressing to full-time over a two-month period.

However, because plaintiff at that time was in Mexico for personal reasons, Dr. Wertzberger subsequently determined that July 1, 1991 was "a reasonable time for expecting Ms. Tovar to return to her work activities as modified by her employer." (Aplee.Supp.App. at 129). Plaintiff's vocational rehabilitation counselor concluded the same

thing. (Aplee.Supp.App. at 131). Plaintiff's attorney advised defendant that plaintiff "will return to work on July 1, 1991." (Aplee.Supp.App. at 128). Plaintiff testified that in June 1991 she received Dr. Wertzberger's letter of June 17, 1991 releasing her to return to work on July 1, 1991, the vocational counselor's report of June 25, 1991 also releasing her to return to work on that day, *and* her own attorney's letter which advised defendant that she would be returning to work on July 1, 1991. (Aplee. Supp.App. at 91-92). Despite learning from multiple sources that she was to return to work on July 1, 1991, plaintiff did not so return. She was in Emporia the entire month of July 1991 but did not once come to the plant and attempt to perform the modified, accommodated light duty position. Instead, she attempted to obtain an off-work slip from Dr. Wertzberger on July 10, 1991 which he declined to provide her.

In late July 1991, defendant's personnel director, Mr. Brownrigg, learned that plaintiff had not returned to work even though her treating physician had released her for work activities. Plaintiff's month-long series of absences were unexcused and constituted job abandonment. Nonetheless, defendant chose to give plaintiff another chance to return to work. Plaintiff's counsel was advised by letter dated August 2, 1991 that plaintiff had not appeared for work and had not contacted the plant, and would be discharged if she did not return to work within two weeks. Plaintiff had knowledge of this warning letter but again did not appear for work. She chose to leave for Mexico on August 10, 1991 for family reasons without advising defendant of her travel plans. Plaintiff's counsel on August 16, 1991 requested additional time to

get plaintiff back to work. Although defendant was under no legal obligation to give any more time to plaintiff, it agreed to extend the return to work or termination deadline until August 19, 1991. When plaintiff again did not return to work by this second extended deadline, defendant discharged plaintiff for job abandonment.

There was no evidence presented below suggesting any causal connection between plaintiff's workers' compensation claim and the termination decision made on August 19, 1991. The record is clear that plaintiff had a medical release to return to work effective no later than July 1, 1991 and that she had knowledge of that release. She was given not one or two, but three opportunities to return to work in the light duty position approved by her physician and her vocational counselor but she chose not to return to work and not to attempt (even for a day) that accommodated position. Plaintiff abandoned her job. At the very least, she disregarded the opinions of her physician and vocational counselor and the explicit directions of her employer about returning to work. The district court was correct in its conclusion that "[t]he undisputed facts reveal that Tovar knew that Dr. Wertzberger had released her to begin part-time work, and that IBP expected her to report to work on July 1 and August 16. Tovar failed to report to work on those dates, and she has not shown by clear and convincing evidence that her absence was legitimately due to any work related injury." July 1, 1994 Memorandum and Order, slip op. at 16.

This case does not raise any substantial issues of federal law. Subject matter jurisdiction was premised solely on diversity of citizenship and both the district court and the court of appeals applied solely Kansas

substantive law. That a federal court is to consider the evidentiary burden applicable at trial in ruling a motion for summary judgment has been well-established at least since 1986 with this Court's decision in *Anderson v. Liberty Lobby, Inc.* This includes consideration of the heightened evidentiary standard imposed by the Kansas Supreme Court in *Ortega v. IBP, inc.* for plaintiffs pursuing common law claims of discharge in retaliation for exercise of rights under the Kansas Workers' Compensation Act.

Every time that a summary judgment is entered in favor of a defendant on a particular claim (or in favor of a plaintiff on a particular defense), the losing party is denied a jury trial on that claim or defense, but that hardly implicates the Seventh Amendment right to jury trial. Federal Rule of Civil Procedure 56 creates a procedure for determination of questions of law in advance of trial and one such question is whether the evidence presented by the parties (or developed during discovery) is sufficient, as a matter of law, such that reasonable jurors could find for the non-movant on each essential element of her claim. That inquiry necessarily requires the federal district court to consider the evidentiary standard that will be applicable to the claim at trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Finally, the underlying facts in this state law action for retaliatory discharge relate to a particular employee, a particular course of medical treatment, a particular

attempt by an employer to accommodate physical restrictions, and a particular failure of the employee to return to work despite directions to do so from her treating physician, her vocational rehabilitation counselor, and her own attorney. The United States Court of Appeals for the Tenth Circuit did not resolve this case in a way that conflicts with applicable decisions of this Court or with decisions of any other United States Court of Appeals. *See* Supreme Court rule 10.1(a) and (3).

## CONCLUSION

For the reasons stated herein, certiorari should be denied and the May 29, 1996 Order and Judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed in all respects.

Respectfully submitted,

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